REA LAW JOURNAL

Vol. 1, No. 6 May, 1939 Page 54

RECENT CASES

Certiorari -- power to deny despite allegations of jurisdictional facts

Utility instituted a certiorari proceeding against a municipality and the Public Works Board which ruled that municipality's plan for construction of a duplicating electric system served a public need and was in the public interest and authorized the issuance of revenue bonds to finance such duplicating system. The petition for certiorari alleged: (1) that City's application to the Public Works Board merely averred the intention of City to issue bonds and obtain a grant from PWA for construction of a municipal system; (2) that Utility at hearing before the Board showed by evidence (a) that Utility's existing system is modern, efficient and sufficient and renders adequate service at reasonable rates; (b) that the proposed municipal plant would duplicate and parallel the Utility's system and render substantially the same service; and (c) that in addition to Utility's interest as utility, it had an interest in the matter as taxpayer; and (3) that City did not introduce or offer any evidence in support of its petition for the approval of its application and no other evidence was offered or introduced in support of such application.

Held, that the lower court erred in denying the petition for certiorari. The allegations of the petition are sufficient and for the purpose of the certiorari proceeding must be regarded as true. The case was remanded for hearing on the merits Alabama Power Co. v. Fort Payne, 187 So. 632 (Ala. 1939).

Commission Jurisdiction -- denial of permission to merge

Pennsylvania Public Utility Commission refused to allow the Northern Power Company to sell its franchises and all property owned by it to the Edison Company and refused to permit a merger of the two companies. Held, reversed on appeal. The alienation of property is an inherent right of an owner and the only restraints that may be imposed are those in the public interest. Therefore, the proposed sale was permissible unless competent evidence demonstrated that the sale adversely affected the public. No such evidence was presented. The court feels that the merger was denied on the basis of the internal financial affairs of the company. This, the court states, is not within the jurisdiction of the Commission. The Commission may only refuse to permit a merger if it will adversely affect the public. The court states inter alia: "Everyone knows that the merger of electric companies has redounded to the public interest, and has enabled them to meet the public requirements growing out of the manifold uses of electricity in this electric age, in a way which smaller units could not have done." Northern Pa. Power Co. v. Pa. Public Utilities Comm., 5 A.(2d) 133 (Pa. 1939).

Corporations -- purposes for which may be organized

Statute provided that cooperative associations may be formed "Either (1) To conduct a mercantile, manufacturing, mechanical or mining business, or to construct or operate telephone or electric transmission lines; or (2)..." A cooperative was formed to generate electricity and to con-

struct electric transmission lines. A member of the cooperative, upon the relation of the State of Iowa, instituted a quo warranto action against the cooperative, contending that the above statute did not empower the cooperative to generate electricity, and furthermore, that the incorporation of the cooperative was invalid because it was organized for more than one purpose, - namely, to generate electricity and to construct lines, in addition to certain corporate "powers" which were set forth in the Articles of Incorporation as "purposes" and the statute, because of its use of the word "or" throughout, especially in connection with the word "either", contemplated the formation of cooperatives for one purpose only. Held, quo warranto denied. The generation of electricity is a manufacturing process, and therefore the word "manufacturing" in the statute is sufficient to authorize the formation of a cooperative to generate electricity. It is also a "mechanical" process, and such word in the statute is also sufficient for the purpose. In addition, the cooperative was formed for only one purpose. While ordinarily there is a clear distinction between corporate purposes and powers, in this statute the Legislation used the words interchangeably, and the Articles are not therefore void in setting forth the "powers" as "purposes." Even if the "powers" are construed as "purposes" they are at most purely incidental "purposes" and not separate ones. Moreover, the generation and transmission of electricity is one purpose, not two. As this cooperative was therefore formed for one purpose only, no decision is necessary as to whether the word "or" is used in the conjunctive or disjunctive sense. Finally, the court indicated that the relator had no standing to bring this quo warranto proceeding at all, but this question was not definitely decided. State of Iowa, ex rel Winterfield v. Hardin County Rural Electric Cooperative (Iowa Sup. Ct. 1939).

Death by Electric Shock - Applicability of the doctrine of res ipsa loquitur

Plaintiff brings an action against the defendant electric company seeking damages for the death of her husband alleged to have been caused by defendant's negligence. The plaintiff testified that she and her husband had been alone in their residence and that he had left her and some twenty minutes later she heard him scream. She ran to him and saw him standing holding a bridge lamp in his hands. The lamp cord was plugged to an overhead fixture. The plaintiff turned off the switch and extinguished the light; whereupon he dropped to the floor and shortly thereafter was pronounced dead from electric shock. The plaintiff produced no further evidence of any acts of negligence of defendant. She contends, however, that having demonstrated an accidental death caused by electrical current furnished by the defendant, that the maxim res ipsa loquitur is applicable and an inference of negligence is permissible and that the jury should have been so instructed. The lower court had entered judgment for the defendant notwithstanding a hung jury. Held, affirmed. Norris v. Philadelphia Electric Co., 5 A.(2d) 114 (Pa. 1939)

The court properly points out that the reason for the rule of res ipsa loquitur is that in certain situations all evidence relating to the cause of an injury is accessible only to the defendant and that in such cases it is reasonable for a rule of law to impose upon the defendant the burden of coming forward with such evidence. However, in the instant case the plaintiff and defendant were equally able to investigate the causes of the accident. In addition, the court states that in a situation such as the instant case where there is an instrumentality dominated by the plaintiff intervening between the caus of the injury and the injury itself, the plaintiff must demonstrate the absence of defect in the instrumentality before the doctrine of res ipsa loquitur can be held to operate.

Eminent Domain - General fears as a result of presence of electric transmission line as element of damages.

Action by farm owner for damages arising out of the acquisition by a power district of a perpetual right-of-way across

REA LAW JOURNAL

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Published Monthly

The Journal is informational only and should in no wise be interpreted as expressing the views of the Rural Electrification Administration or any division thereof.

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plaintiff's lands by eminent domain proceedings. A high power transmission line was to be erected on the right-of-way. The defendant power district appealed from the allowance of certain damages principally on the ground that the lower court allowed the jury to take into consideration general fears as to "dangers" from the presence of the transmission lines. Held, that the damages should be modified to eliminate items granted "upon the evidence of fear of damages allowed by the court to go to the jury, especially as this fear is expressed by farmers with no scientific knowledge of their own." Dunlap v. Loupe River Public Power District, 284 N. W. 742 (Neb. 1939)

Municipal Corporations - Election ballot on construction of electric transmission and distribution lines using term "and/or" held void

A municipality submitted to its electors the question of whether the City should construct or acquire an electric power system. The ballot asked whether the City should "construct, purchase, or otherwise acquire an electric line and power distribution system, and/or transmission lines..." The court held, inter alia, that the use of the terminology "and/or" rendered it impossible for the voters to determine what they were voting for or against. That after the election it left the choice for the officers to decide whether to have a distribution and transmission system or just one without the other. The net result was that the propositions presented "were multiple and obscure and were not fairly and candidly stated." Drummond v. Columbus, 6 U.S. L. Week. 1211 (Neb. Sup. Ct. 1939)

ADMINISTRATIVE INTERPRETATION

Commission Jurisdiction Over Source of Energy

City, operating a municipal electric plant, applied to Commission for authority to construct a generating unit to constitute the source of energy for the plant. As an objection to the grant of the application it was demonstrated that the cost of producing energy in this fashion is greater than the cost of purchasing it from a private utility. Held, application granted. Application of Cumberland, Wis. P.S.C., March 6, 1939, C.C.H. Pub. Util. & Carr. Serv. Wis. Vol. para. 1526.

The Commission points out that the primary duty of the Commission is to safeguard the consumer and that so long as the rate to the consumer is no higher, the municipal plant may obtain energy in whatever fashion it pleases. The Commission admits that a loss will probably result and that it must necessarily be borne by the taxpayer, but it concludes that it was not set up to protect the taxpayer and that the authority of the Commission "ends with the duty of protecting the consumer."

NOTE

Easements Granted by Parol

What is the result when a landowner gives oral permission to build electric lines across his property, where the lines are built and used, and where later the landowner seeks a mandatory injunction to have them removed? The law on the subject may be summarized in the words of one annotator: "The authorities upon this branch of the law have ever been and still remain so conflicting as to make their reconciliation totally impossible upon any conceivable theory." 31 Am. St. Rep. 712.

There is a long line of cases holding that an easement is an interest in land within the Statute of Frands which cannot be created by parol. See 1 Thompson, Real Property (1924) 403 n. 31. It has frequently been stated that easements can be created only by a deed or by a conveyance operating as a deed, and that a parol license, permission or acquiescence cannot ordinarily create or transmit them. Dorris v. Sullivan, 90 Calif. 279, 27 Pac. 216; Wilmington v. Evans, 166 Ill. 548, 46 N.E. 1083; Taylor v. Gerrish, 59 N.H. 569; Banghart v. Flummerfelt, 43 N.J.L. 28; Wiseman v. Lucksinger, 84 N.Y. 31, 38 Am. Rep. 479; Cronkhite v. Cronkhite, 94 N.Y. 323; Huff v. McCauley, 53 Pa. St. 206, 91 Am. Dec. 203; Paris v. Miller, Meigs (19 Tenn.) 158, 33 Am. Dec. 138; Rice v. Roberts, 24 Wis. 461, 1 Am Rep. 195. And a writing, though executed upon a valuable consideration, is not effectual to create an easement unless it operates as a grant. White v. Manh. R. Co., 139 N.Y. 19, 34 N. E. 887.

What then is created by a parol grant? The books refer to the result of a parol grant of a right-of-way as a license. And a license is ordinarily revocable at will by the licensor. Wood v. Leadbitter, 13 Mees. and W. 838, 16 Eng. Rul. Cas. 49. But upon the principle that an executed parol contract for the sale of land will be upheld, some courts have sustained a parol grant of an easement notwithstanding the rule that such grant is within the Statute of Frauds and therefore required to be in writing. In other cases this doctrine of part performance has not been applied, but has even been severely criticized.

At other times the court has based its decision upon the theory of an estoppel in pais, that is, that the licensor, by standing by without making objection and permitting the improvement to be made and large sums of money to be expended, is estopped to maintain ejectment or to obtain an injunction. Under these cases the landowner sometimes is allowed damages for the injury done to his property.

The leading case on the subject in this country is Rerick v. Kern, 14 Serg. and R. (Pa.) 267, 16 Am. Dec. 497 (1826), in which it appears that Kern, being about to erect a sawmill on a branch known as the right hand stream, found a better location on the left hand stream, and, having obtained Rerick's permission, built his mill on the latter stream, which, without the aid of water from the right hand stream, would have been wholly insufficient to operate the mill. No deed was executed or any consideration paid for the privilege; but, after Kern, in consequence of the permission, had put his mill in successful operation, Rerick revoked the license, by removing the dam which was built to divert the water. It was held that the license, in consequence of the improvement, became irrevocable. Gibson, J., in delivering the opinion of the court, said: "But a license may become an agreement on valuable consideration, as when the enjoyment of it must necessarily be preceded by the expenditure of money; and, when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it as soon as the benefit expected from the expenditure is beginning to be perceived."

The leading case which criticizes this view is Lawrence v. Springer, 49 N.J. Eq. 289, 24 Atl. 933 (1892). Beasley, C. J., says: "Nor is it questioned, nor questionable, that a parol imposition of a

servitude of this kind upon land is in flat contradiction of the Statute of Frauds. It is true, indeed, that in one class of cases, as is well known, courts of conscience have felt dispensed from putting in force the provisions of that act. This has been the course pursued where a parol agreement for the purchase of lands, or of some interest in them, has been performed to the extent of possession having been taken in part execution of such contract. But, while this is the undeniable rule in equity, it should be ever borne in mind that its introduction has been regretted by the wisest judges. 'The statute,' says Lord Redesdale, 'was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest, to any person who has been in the habit of practicing in courts of equity, than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements, from the necessity of the case, would have been reduced to writing; whereas it is manifest that the decisions on the subject have opened a new door to fraud.' And these strictures are pointed with the emphatic declaration that 'it is, therefore, absolutely necessary for courts of equity to make a stand, and not carry the decisions further.' Lindsay v. Lynch, 2 Schoales & L. 4. And in the same vein, Judge Story (2 Eq. Jur., sec. 766) says that 'considerations of this sort have led eminent judges to declare that they would not carry the exceptions of cases from the Statute of Frauds further than they were compelled to do by former decisions.' To the same purpose are the criticisms of Chancellor Kent in Phillip v. Thompson, 1 Johns, Ch. 149, and of Chancellor Zabriskie in Cooper v. Carlisle, 17 N.J. Eq. 529."

But the facts of Lawrence v. Springer distinguish it from the facts which we are here considering. In Lawrence v. Springer improvements were made on the land of the licensee which caused greater flow of water on to the land of the licensor. This alone would clearly remove this case from the equitable doctrine so forcefully criticized by the Chief Justice. But the doctrine of Lawrence v. Springer has now become firmly fixed in New Jersey Law, VanHorn v. Clark, 56 N.J. Eq. 476, 40 Atl. 203; Peer v. Wadsworth, 67 N.J. Eq. 191, 58 Atl. 379; Atl. Chem. Wks. v. Fukel, 118 Atl. 748.

A review of the leading cases in most of the states will show the trend of thought and the irreconcilable difference of opinion of the two schools of thought. See Indianapolis and C. Traction Co. v. Arlington Tel. Co., 47 Ind. App. 157, 95 N.E. 280 (1911); Arbaugh v. Alexander, 151 Ia. 552, 132 N.W. 179; Clark v. Glidden, 60 Vt. 702, 15 Atl. 358; Brantley v. Perry 120 Ga. 760, 48 S.E. 332; Munch v. Stetler 109 Minn. 403, 124 N.W. 14; Flickinger v. Shaw, 87 Cal. 126, 25 Pac. 268; Garrett v. Bishop, 27 Ore. 349, 41 Pac. 10; Gilmore v. Armstrong, 48 Neb. 92, 66 N.W. 998; DeGraffenreid v. Savage, 9 Colo. App. 131, 47 Pac. 902; Carrollton Tel. Exch. Co. v. Spicer, 177 Ky. 340, 197 S.W. 827; Wilson v. Chalfont, 15 Ohio 248; Rhodes v. Otis, 33 Ala. 578; Thoemke v. Fiedler, 91 Wis. 386, 64 N.W. 1030; Lee v. McLeod, 12 Nev. 280; Wynn v. Garland, 19 Ark. 23; Ameriscoggin Bridge Co. v. Bragg, 11 N.H. 102; Castner v. Benz, 67 Kan. 486, 73 Pac. 67; Albrecht v. Drake Lumber Co., 67 Fla. 310, 65 So. 98; Butz v. Richland Township, 28 S.D. 442, 134 N.W. 895; Kent v. Dobyns, 112 Va. 586, 72 S.E. 139; Girard v. Lehigh Stone Co., 280 Ill. 479, 117 N.E. 698; Reynolds v. McLemore, 241 S.W. 606 (Tex. Civ. App.); Johnson v. Bartron, 23 N.D. 629, 137 N.W. 1092. Contra: Hodgkins v. Farrington, 150 Mass. 19, 22 N.E. 73; Croasdale v. Lanigan, 129 N.Y. 604, 29 N. E. 824; Mine LaMotte L. & S. Co. v. White, 106 Mo. App. 222, 80 S.W. 356; Prince v. Chase, 10 Conn. 375, 27 Am. Dec. 675; Lewi v. Patton, 42 Mont. 528, 113 Pac. 745; Belzoni Oil Co. v. Y. and M.V.R. Co., 94 Miss. 58, 47 So. 468; Nowlin Lumber Co. v. Wilson, 119 Mich. 406, 78 N.W. 338; Kibett v. McKeithan, 90 N.C. 106; Hathaway v. Yakima Water, Light and Power Co., 14 Wash 469, 44 Pac. 896, 53 Am. St. Rep. 874; Yager v. Woodruff, 17 Utah 361, 53 Pac.104 Pifer v. Brown, 43 W. Va. 412, 27 S.E. 399 Long. v. Buchanan, 27 Md. 502; Foster v. Browning, 4 R.I. 47.

The lack of clarity in the law emphasizes the importance of obtaining written easements for rural electrification projects.

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LEGAL MEMORANDA RECEIVED IN APRIL

933. Loans for Purchase of Electrically Operated Irrigation Equipment
Baldinger to O'Callaghan

934. Payment of Interest by Cooperative on Meter Deposits
Broderick to Rall

935. The Applicability of Usury Laws to Installment Sale Transactions
Broderick to O'Callaghan

937. Validity of Sale by Mississippi Municipality of Electric Plant Acquired by Municipal Bonds
Hoyt to Blackburn

938. Approval of Contract with Unlicensed Engineer (Neb.)
Broderick to Helfrich

939. Conflict of Subsequent Legilsation Upon Existing Corporate Charter -- Conversion Provision in REA Model Act
Lett to O'Callaghan

940. Retail Instalment Sales Contracts and the Usury Statutes
Broderick to O'Callaghan

941. Power of Kentucky Fiscal Cour to Deny Issuance of Franchise or Restrict It to Certain Areas
Winokur to Irion

943. Notice of Meeting of Members as Constituting Acceptance of Applicants as Members
Lett to Penstone

944. Validity of Indorsement of Instrument on its Face
Broderick to O'Callaghan

945. Unrecorded Easements (Tenn.)
Lett to Summers

946. Applicability of Virginia Billboard Control Law to Signs of REA Cooperatives
Winokur to VanHorn

947. Conditional Sale and Chattel Mortgage Problems-Financing the Sale of Irrigation Equipment (Neb.)
Broderick to O'Callaghan

948. Validity of Bonds Issued Under an Election Resolution Containing a Statement to the Effect that Grant was to be Made, Where no Grant was Obtained
Hoyt to Blackburn

950. Digest of Eminent Domain Statutes
Lett to Summers

951. Effect of Failure of Stockholders of a Kansas Borrower to Authorize a Mortgage
Winokur to Penstone

952. Liability of Cooperative for Injuries Sustained by Easement Solicitor on Way Home
Hoyt to Mrs. Boyce

953. Instrument Left with Recording Officer as Recordation Notice (va.)
Winokur to O'Callaghan

954. Destruction of Property and Taking Electrical Current as Crimes (Miss.)
Gerber to Blackburn

955. Conditional Sales, Chattel Mortgage, etc. (Ind.)
Broderick to O'Callaghan

Tax Memoranda

T133. Recordation Taxes in Maryland
Jones to Lamberton

T134. Iowa Sales and Use Taxes
Altkrug to Travis

T135. Valuation for Taxation (Okla.)
Altkrug to Nicholson

T136. Purchases by REA Cooperatives and State Sales Taxes
Lett to Nicholson and Altkrug

T137. State Taxation of Federal Employees
Lett to Nicholson

RECENT STATUTES

GEORGIA

The Georgia Electric Membership Corporation Act is amended as follows:

1. "Acquire" in the definition section is defined to include also "condemnation or other mode of acquisition."

2. Section 4(7) is amended to grant to membership corporations the power to acquire rights-of-way, easements, etc. by condemnation as provided in Chapter 36-3, 4,6 of Tit. 36 of the 1933 Code.

3. A statute of limitations is added to the act limiting actions against membership corporation to twelve months for rights growing out of acquisition of rights-of-way, etc. Laws, 1939, No. 252 (Approved March 23, 1939).

IOWA

"Any employee of a corporation who is a notary public and who is not a stockholder in said corporation, and who is not otherwise financially interested in the subject matter of said instrument, is hereby authorized to take acknowledgment of any person or an instrument running to such corporation, regardless of the title or position that said notary shall hold as employee of such corporation." H.B. No. 623 (Approved April 15, 1939).

MINNESOTA

All real estate mortgages heretofore executed and acknowledged where the notarial seal did not bear the name of the county in which the notary resided are validated and legalized and the recording thereof is validated and legalized. Laws, 1939, c. 151 (Approved April 8, 1939).

Cooperatives organized under Minn. Laws of 1923, c. 326, engaged in the electrical or power business in rural areas are recognized as quasi-public and shall be subject to a tax of $10 for each 100 members or fraction thereof. Such tax, however, shall be in lieu of all personal property, taxes state, county or local upon distribution lines and appurtenances. Laws, 1939, c. 303 (Approved April 18, 1939).

NEVADA

Section 6 of the Non-profit Cooperative Corporation Act is amended to provide that such corporations may amend Articles of Incorporation in the manner provided in Section 7 of the General Incorporation Act (Nev. Comp. Laws, 1929) sec. 1606. Laws, 1939, c.29 (Approved February 23, 1939).

NEW MEXICO

Act passed setting up an Electrical Administrative Board providing for the licensing of electrical contractors and electricians and establishing standards for wiring and installation of electrical equipment. The Act provides that before any electrical wiring can be installed within any building or before any alteration can be made on any existing installation a permit must be secured from the electrical inspector in that jurisdiction Temporary and minor work is executed. A firm engaged in electrical wiring may obtain an annual permit in lieu of individual permits for each installation. After any work is done the electrical inspector must be informed so that he may issue a certificate of approval or state the defects with orders to correct the defects. Laws, 1939, c. 192 (Approved March 16, 1939).

OKLAHOMA

Oklahoma enacts the new Rural Electric Cooperative Act in toto. S.B. No. 141 (Approved April 14, 1939).

SOUTH DAKOTA

This law, known as the Use Tax Act of 1939 imposes an excise tax upon the privilege of the use, storage, and consumption of tangible personal property purchased for use in South Dakota. The rate is the same as the Sales Tax (Sec. 57.3201, S. Dak. Code, 1939). The tax is also imposed upon the person using, storing, or otherwise consuming the property until the tax has been paid. Included in the definition of "tangible personal property" is electricity. Exempted from the tax are goods on which the Sales Tax has been paid. Administrative provisions are included in the Act. S.B. No. 278 (Effective July 1, 1939).

VERMONT

Licensing act set up for all professional engineers. A Board is created empowered to give examinations and otherwise administer the Act. H.B. No. 303 (Approved April 6, 1939).

WYOMING

Sections 38-301 and 302 are amended to include corporations operating electric transmission lines. Therefore, such corporations are authorized to set their poles, wires, etc. and other fixtures "along, across or under any of the public roads, streets and waters of this state in such manner as not to incommode the public in the use of such roads, streets and waters; provided, any telegraph or telephone company /electric companies apparently omitted by error, ed. note/ desiring to place their wires and other fixtures underground in any city shall first obtain consent from said city through the municipal authorities thereof."

"Such companies are also authorized to enter upon any land whether owned by private persons in fee or in any less estate by any corporation, whether acquired by purchase or by virtue of any provision in the charter of such corporation, except railroad rights-of-way, for the purpose of making preliminary surveys and examination with a view of appropriating so much of said lands as may be necessary to" construct their lines. S.B. No. 105 (Approved February 18, 1939)

REVIEWING THE LAW REVIEWS

Morris, Curative Statutes of Colorado Respecting Titles to Real Estate (1939) 16 Dicta 35, 71.

A discussion of Colorado real estate and lien law with emphasis upon statutes designed to eliminate undesirable situations.

Welch, The TVA as a Factor in Public Utility Regulations (1939) 27 Geo. L. J. 667.

Reese, State Regulation of Municipally Owned Electric Utilities (1939) 7 Geo. Wash. L. Rev. 557.

An excellent discussion of commission jurisdiction over municipal plants in all states.

The April issue of the Geo. Wash. L. Rev. (1939) contains a symposium on administrative law.

Note (1939) 4 Mo. L. Rev. 186: Foreclosure by Power of Sale Inserted in a Mortgage or Deed of Trust.

Brabner-Smith, Judicial Limitations on Federal Appropriations (1939) 25 Va. L. Rev. 641.
